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COURT OF APPEAL FOR ONTARIO

BORINS, FELDMAN AND MACPHERSON JJ.A.

B E T W E E N :	)	
	)	
VANN NIAGARA LTD.	)	**John A. Crossingham**
	)	**for the appellant**
	)	
Appellant	)	
	)	
- and -	)	
	)	
THE CORPORATION OF THE	)	**George J. Rust-D'Eye and**
TOWN OF OAKVILLE	)	**Barnet H. Kussner**
	)	**for the respondent**
	)	
Respondent	)	
	)	
	)	**Heard: March 4, 2002**

On appeal from the judgment of Justice Linda M. Walters dated April 3, 2001.

BORINS J.A.:

Overview

[1] This appeal concerns the constitutional validity of a municipal by-law restricting or prohibiting the erection of certain kinds of signs in the Town of Oakville. The issue is whether the total prohibition on billboard signs and third party signs infringes the right to freedom of expression protected under s. 2(b) of the *Canadian Charter of Rights and Freedoms* and, if so, whether that infringement is justified under s. 1.

[2] In the court below, Walters J. dismissed the application of Vann Niagara Ltd. (Vann) for a declaration that By-law 1994-142 (the "Sign By-law") of the City of Oakville is unconstitutional for the following reasons: (1) insufficient evidence to determine whether the expression in question (billboard advertising) is protected by s. 2(b); (2) insufficient evidence of the impact of the by-law on the applicant's ability to

express itself; and (3) even if the by-law does offend s. 2(b), it is saved under s. 1. For the reasons set out below, I would allow the appeal.

Facts

[3] Vann is an advertising company that applied to the Town of Oakville ("Oakville") in 2000 for permission to erect 86 billboard signs in 52 specific locations. In 1994, Oakville passed a sign by-law regulating the posting of signs on private lands. Section 2(5)(a) of the sign by-law states: "No person shall locate or permit the location of a billboard sign". Section 2(16) of the sign by-law prohibits all third party signs on private land within Oakville. A third party sign is defined as "any sign which directs attention to products, goods, services, activities or facilities which are not the principle products, goods, services, activities or facilities provided on the premises upon which the sign is located". The sign by-law, therefore, creates an absolute prohibition on billboards within Oakville and substantially prohibits third party signs on private lands. Persons who erect signs without a permit are subject to a fine.

[4] In 2000, six years after the sign by-law had been enacted, Oakville held a referendum on whether to modify the by-law and permit the erection of some billboards. The referendum question was: "Should the Town of Oakville amend its Sign By-law 1994-142 to allow for the erection and display of billboard/third party signs in some locations in the Town?" However, less than 50% of the eligible voters turned out to vote, so the results of the referendum were not legally binding on the Town Council.

[5] Oakville, like all cities in Ontario, has been divided into different zones for the purposes of city planning. The areas in which Vann seeks to erect billboards are designated as commercial and industrial zones, and include the area along the Queensway near manufacturing plants and along railway and hydro corridors. Vann does not seek a permit to erect billboards in any zones that are designated as residential or heritage zones, and concedes that Oakville can regulate the use of billboards in those areas.

[6] Vann's advertising business consists of leasing large signs to companies and individuals for the purpose of advertising the products or services which they offer to the public. Vann locates its signs on property which it leases from its owners, such as on railway or hydro rights of way. In the advertising industry these signs are known as billboards. Billboards come in standard sizes, the most common of which are 10 feet by 20 feet, or 200 square feet. As such, Vann's billboards do not advertise the products or services of the owners of the property upon which they are located.

Submissions of the parties

[7] Vann submits that the sign by-law contravenes its right to freedom of expression protected by s. 2(b) of the *Charter*. It argues that billboard advertising is a form of

"expression" that is protected by s. 2(b). Vann acknowledges that there is an important public purpose behind the by-law, which is to prevent the proliferation of unregulated signs in Oakville. However, Vann argues that the sign by-law fails to satisfy the requirements of s. 1 because, as a total prohibition on billboards, the sign by-law does not minimally impair Vann's rights.

[8] For its part, Oakville argues that billboard advertising does not fall within the scope of protection afforded by s. 2(b) of the *Charter*. Moreover, in contrast to Vann's interpretation, Oakville characterizes the objectives of the sign by-law as follows: to preserve and enhance the town's unique character; to prevent aesthetic blight; to minimize distractions to motorists; to protect the public from unsafe signs; and to encourage the compatibility of signs with their surroundings. Oakville asserts that the sign by-law is rationally connected to its purposes.

Relevant legislative and Constitutional provisions

[9] The municipality is delegated the authority to pass by-laws regulating signs pursuant to s. 210(146) of the *Municipal Act*, R.S.O. 1990 c. M. 45. Vann does not challenge the enabling legislation under which the by-law was passed. The relevant provisions of by-law 1994-142 read as follows:

> **1.** Definitions
>
> …
>
> **(9)** Billboard sign – Any ground sign other than a temporary Real Estate sign…measuring more than 7.5 square metres (80 square feet) in sign area;
>
> …
>
> **(20)** Ground sign – Any sign which is free standing in a fixed position and is wholly supported by a sign structure permanently attached to or affixed into the ground and which is not supported by any building or other structure;
>
> …
>
> **(42)** Third party sign – Any sign which directs attention to products, goods, services, activities or facilities which

> are not the principal products, goods, services, activities or facilities provided on the premises upon which the sign is located;
>
> **2(5)(a)** No person shall locate or permit the location of a billboard sign.
>
> **2(16)** No person shall locate or permit the location of a third party sign.

[10] The relevant provisions of the *Charter* are as follows:

> ***Canadian Charter of Rights and Freedoms***
>
> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **2.** Everyone has the following fundamental freedoms:
>
> **…**
>
> **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication….

Analysis

Is there an infringement of s. 2(b) of the *Charter*?

[11] According to Chief Justice Dickson's analysis in *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, there are two steps to perform when analysing a law in light of s. 2(b) of the *Charter*. The first step consists of two parts. First, it must be determined whether or not billboards constitute expression. As the second part of that inquiry, it must be determined whether that expression is protected under s. 2(b). As for the second step, it must be determined whether the purpose *or the effect* of the by-law is to limit the freedom of expression. Finally, if the by-law infringes s. 2(b), it is to determined whether it is a reasonable limit according to s. 1 of the *Charter*.

[12] The parties have conceded that billboard advertising is a form of expression. However, Oakville contends that billboard advertising is not a form of expression protected by s. 2(b) of the *Charter*, and they argue that the appellant has not established an infringement of s. 2(b) on the facts. The respondent relies on *MacKay v. Manitoba,* [1989] 2 S.C.R. 357 in support of its contention that there is an insufficient factual basis to support the appellant's application. In *Mackay,* the Supreme Court of Canada held at p. 361 that

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions.

However, I note that in *MacKay*, as Cory J. stated at p. 363, "there [had] been *not one particle of evidence put before the Court*" (emphasis added). That situation is distinct from this case, in which the claim was based on affidavit evidence and some exhibits, including photographs.

[13] The application judge held that she lacked a factual basis to determine whether the advertising is protected under s. 2(b). However, the application judge acknowledged that she *knew* that "the content of the proposed billboard would contain commercial messages." I take this statement to mean that the application judge accepted as a fact that the content of the billboards' messages would be commercial in nature. I note that in addition to the commercial expression of prospective customers, Vann asked the court to take judicial notice of the fact that, as owner of the signs for rent, it can advertise its own business on the billboards. I am satisfied that the record established that the appellant's freedom of expression and that of its customers was affected by the sign by-law.

[14] The application judge's factual finding is sufficient to determine whether the form and content of the proposed expression garners the protection of s. 2(b). Clearly, the intended expression is commercial expression, or advertising. As I will set out, it is well-settled as a matter of law that the right to free expression protects commercial expression.

[15] In *Ford v. Quebec*, [1988] 2 S.C.R. 712, the Supreme Court of Canada was asked to consider whether commercial expression is protected by s. 2(b). While it was not necessary to decide that issue, the Court rejected the submission that commercial expression is not protected, stating at pp. 766-67:

> [g]iven the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian *Charter* should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the *Charter*.

[16] In *Irwin Toy*, the Supreme Court determined conclusively that commercial expression is protected by s. 2(b), and it re-iterated that conclusion in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 and most recently in *R. v. Guignard* (2002), 209 D.L.R. (4th) 549.

[17] *Guignard* is very similar to the present case. In *Guignard*, the proprietor of a building installed a billboard on his own property indicating his displeasure with his insurance company. He was prosecuted under the governing municipal by-law which prohibited such signs. LeBel J., for the Supreme Court, affirmed that commercial expression, and in particular, commercial expression on billboards, enjoys the protection of s. 2(b) of the *Charter*. LeBel J. eloquently stated the values underpinning the protection of commercial expression. He wrote at para. 21

> [i]n applying s. 2(b) of the *Charter*, this Court has recognized the substantial value of freedom of commercial expression. The need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information.

Commercial expression is, thus, a key component of our economic system and therefore merits *Charter* protection.

[18] LeBel J. also observed that the right to freedom of expression protects even expression that is challenging and disturbing, and acknowledged at para. 23 that "the ubiquitous presence of advertising is a defining characteristic of western societies" that we accept "sometimes with mixed feelings". He went on to say at para. 25:

> [s]igns, which have been used for centuries to communicate political, artistic or economic information, sometimes convey forceful messages. Signs, in various forms, are thus a public, accessible and effective form of expressive activity for anyone who cannot undertake media campaigns.

Vann argues that its clientele are not likely to advertise using media such as television and radio because of the cost and targeted and limited audience exposure. Consequently, they fall squarely within the group identified by LeBel J.

[19] In *Irwin Toy*, Dickson C.J. observed at p. 968, "'[e]xpression' has both a content and a form, and the two can be inextricably connected". Oakville's sign by-law purports to limit both the content and the form of expression. The prohibition against third party

signs constitutes a limit on the content of expression, while the restriction on the size of signs limits the form of expression. The precise content of the proposed signs has not been established. However, whether that content be commercial expression in the form of advertising or consumers expressing their dissatisfaction with a business as in *Guignard*, the form and content are protected under s. 2(b).

[20] As I have outlined above, Vann does not suggest that the purpose of the respondent in passing the sign by-law is to limit its freedom of expression. Nevertheless, the effect of the sign by-law is to prevent Vann from engaging in a particular form of expression and from expressing certain messages. Thus s. 2(b) of the *Charter* is engaged.

[21] Finally, I note that there are three cases from this court which have considered the constitutional validity of by-laws similar to Oakville's sign by-law in different communities in Ontario. In all three cases, the responding towns and cities conceded that their by-laws infringed s. 2(b) of the *Charter*, and this court viewed those concessions with approval. See: *Nichol (Township) v. McCarthy Signs Co. Ltd* (1997), 33 O.R. (3d) 771; *Stoney Creek (City) v. Ad Vantage Signs Ltd.* (1997), 34 O.R. (3d) 65; *Canadian Mobile Sign Assn v. Burlington (City)* (1997), 34 O.R. (3d) 134.

Justification

[22] The onus now shifts to Oakville to demonstrate that its sign by-law is a reasonable limit that can be demonstrably justified. The test set out by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103 requires Oakville to show, first, that its objective in passing the sign by-law is pressing and substantial; second, that the by-law is rationally connected to that objective; third, that the by-law minimally impairs the right to freedom of expression; and finally, that there is proportionality between the effects and the objectives of the by-law.

[23] In *RJR-Macdonald*, at para. 129, McLachlin J. held that where freedom of expression is infringed, there must be a "reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement." In order to meet the burden of the test set out in *Oakes*, Oakville may draw on evidence that is "supplemented by common sense and inferential reasoning": *Guignard*, at para. 28.

[24] *Oakes* obliges me to begin the s. 1 analysis by determining whether the objective of the by-law is pressing and substantial. Oakville asserts that the purpose of the by-law is to protect the public from unsafe signs, to reduce distractions that may be an impediment to road safety, to prevent the blight of unsightly signs, and to preserve the unique character of Oakville. Vann does not seriously contest this characterization of the purpose, and it concedes that this purpose is pressing and substantial. Assuming that Oakville's assertions accurately reflect the purpose of the sign by-law, I am satisfied that the objective of the sign by-law satisfies the first step of the *Oakes* test.

[25] The second step of the *Oakes* test requires an assessment of the proportionality of the sign by-law. In my view, Oakville has failed to demonstrate that the sign by-law is rationally connected to achieving its stated goals. Moreover, the sign by-law, as a total prohibition on a form of expression, is not minimally impairing. Thus, the sign by-law fails the proportionality analysis of the *Oakes* test.

[26] First, Oakville has failed to demonstrate that the blanket prohibition on billboard signs is rationally connected to preserving the unique small town feel of the city. The zones in which Vann seeks permission to erect billboards cannot be said to be unique. The sign by-law prohibits billboards throughout the whole city, including unremarkable industrial zones. In a telling demonstration, during cross-examination, the manager of Oakville's Current Planning section (who has been employed as a planner in Oakville since 1978) was shown three unmarked photographs of industrial zones of southern Ontario communities and asked to identify which of the photographs depicted Oakville. The manager of planning was unable to identify Oakville, exclaiming "what a test!" A uniform ban on billboard signs that includes a prohibition on signs in unremarkable areas is not rationally connected to preserving the "unique aesthetic" and "small town feel" of Oakville.

[27] In addition, the ban on third party signs is not rationally connected to preserving the small town character of Oakville. This case is easily distinguished from *Nichol Township,* a case in which this court upheld a prohibition on third party signs as a reasonable limit on freedom of expression under s. 1. Nichol Township is a rural, agricultural community that had received requests for permission to erect very large signs in scenic areas. The signs related to businesses in other towns. In that context, the prohibition on third party signs was connected to maintaining the character of the community. Oakville, however, is a city with a population of 142,000 and with a sizable industrial economy. The prohibition on third party signs in industrial areas cannot be said to be rationally connected to preserving a small town feel in this context.

[28] Oakville has provided no evidence to indicate that its prohibition on billboards promotes road safety. Rather, in the place of evidence in the form of data or evidence from studies, Oakville relies on the opinions of its city planners to that effect. Nonetheless, I am willing to accept that fewer visual distractions do promote road safety such that the prohibition on billboards is rationally connected to that goal. However, the location of billboards a sufficient distance from the travelled portion of a highway will not impair motorists from observing traffic on the highway.

[29] Second, I am not satisfied that the sign by-law minimally impairs the right to freedom of expression. The standard of justification for a by-law such as this, which constitutes a complete ban on a form of expression, is high. In *RJR-Macdonald*, at para. 163, McLachlin J. held:

> [i]t will be more difficult to justify a complete ban on a form of expression than a partial ban….A full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by s. 1 to save the violation of free speech is not established.

In approaching this part of the s. 1 analysis, I find it helpful to make reference to the other two decisions of this court regarding sign by-laws.

[30] In *Stoney Creek*, the city had enacted a by-law generally prohibiting the use of mobile signs. Some limited exceptions were permitted. The appellant was convicted of erecting a mobile sign without having obtained a permit to do so, and would not have qualified for a permit even if it had applied for one. In that case, Charron J.A. refused to accept the city's contention that because the by-law that permitted many other types of signs, including billboards, it struck a fair balance between individual's rights and the community's interest in pursuing its legitimate goals (which were virtually identical to the goals of the by-law in this case). Charron J.A. held that regulation of the size, number, and location of the mobile signs would achieve the legislative purpose equally as effectively as the total prohibition. Since the city failed to show that the by-law minimally impaired the right to freedom of expression, Charron J.A. declared the by-law invalid.

[31] The definition of a billboard in the sign by-law defines a billboard as a sign measuring more than 80 square feet in sign area. This definition indicates that the by-law's drafters acknowledge that a billboard is a sign measuring more than 80 square feet. Thus, the restriction of the size of signs to 80 square feet is not merely a restriction on the size of a billboard. Rather, the by-law prohibits a type of sign. According to *Stoney Creek* at pp. 72-73, such a prohibition cannot be justified under s. 1 as minimally impairing the right of freedom of expression. As Vann acknowledged, Oakville can minimally impair its rights by regulating the number and locations of billboard signs.

[32] In *Burlington*, released simultaneously with *Stoney Creek*, the city had passed a by-law permitting the erection of mobile signs, but regulating their number and illumination, and imposing time limits on their use. Prior to enacting that by-law, the city engaged in several years of study and consultation with the public. The by-law was reviewed by a committee that included members of the mobile sign industry prior to being enacted. The court rejected the appellant sign association's submissions that the by-law was overly broad and therefore not justified under s. 1. Rather, the court held that

the by-law was carefully tailored to meet its objectives and that its impact on freedom of expression was proportionate to the demonstrated benefits of reducing the traffic hazards and visual clutter previously caused by such signs.

[33] As I have indicated, Oakville's sign by-law imposes a complete prohibition on billboard signs and on third party signs. The respondent argues that its sign by-law reflects the will of the community, as evidenced by the results of the non-binding referendum, and should therefore be upheld just as the restriction in *Burlington* was upheld. In my view, the results of the non-binding referendum are of no assistance to the respondent. The will of the public to restrict rights does not, without more, justify that restriction. In *Burlington*, the city engaged in meaningful study and discussion with representatives of the public and of the mobile sign industry and enacted a carefully tailored by-law that restricted sign use, but did not prohibit it. In this case, the referendum conducted by Oakville resulted in such a low public response that it was not legally binding, with the result that it does not assist the respondent.

[34] The only evidence of public consultation regarding the by-law is the Minutes of a Public Meeting on July 19, 2000 concerning whether or not Oakville should hold a referendum on the impugned sign by-law. Unlike the public consultation that occurred in *Burlington*, this meeting occurred six years after the offending by-law had already been in place. Moreover, during the meeting, counsel for members of the billboard industry who had applied, as Vann had, for permission to erect billboard signs and third party signs, indicated their willingness to negotiate with the city to arrive at a mutually agreeable compromise; however, there is no indication that such discussion occurred, and the referendum went ahead. Most importantly, however, there has been no effort to tailor the sign by-law such that it minimally impairs the right to freedom of expression. This case is, therefore, comparable to *Stoney Creek*, with the result that the sign by-law cannot be justified under s. 1 of the *Charter*.

[35] In my view, s. 2(5)(a) of the by-law, regulating billboards, and s. 2(16), regulating third party signs are complementary. Their combined effect is to ban all billboard and third party advertising on private lands in Oakville. I am satisfied that the entirety of Vann's advertising business comes within the prohibition of ss. 2(5)(a) and 2(16), which, no doubt, explains why Vann challenged the constitutionality of both sections.

[36] I reach this conclusion on the basis of Vann's advertising business and the definitions of billboard sign and third party sign in ss. 1(9) and (42), respectively, of the by-law. Each sign which Vann intends to locate, whether it is larger or smaller than the 80 square foot definition in s. 1(9), by the nature of the advertising it contains and where it is to be located is necessarily a third party sign as defined by s. 1(9). This is because the sign advertises products and services which are not the products and services "provided on the premises upon which the sign is located". Thus, if a billboard type of

sign is larger than 80 square feet it is prohibited by s. 2(5)(a); if it is less than 80 square feet, it is prohibited by s. 2(16). It follows that by the nature of its business Vann is affected by both sections of the by-law.

Conclusion

[37] Oakville's By-law 1994-142 infringes the right to freedom of expression and it cannot be justified under s. 1 of the *Charter*. I would, therefore, allow the appeal, set aside the judgment of the application judge and order that the appellant's application for a declaration of invalidity be granted, However, I would suspend that declaration for a period of six months. The appellant is to have its costs of the application and the appeal, on a partial indemnity scale. I would fix the appellant's costs of the appeal at $8,000.

"S. Borins J.A."
I agree K. Feldman J.A."

MACPHERSON J.A. (Dissenting in part):

[38] I have had the opportunity to read the draft reasons of my colleague Borins J.A. in this appeal. I agree with his conclusion that the third party sign component of the Town of Oakville by-law is invalid. I disagree with his conclusion that the billboard component of the by-law is invalid. Because my colleague has set out the relevant factual background, statutory provisions and legal principles, I can state my reasons and conclusions in relatively brief compass.

(1) Ripeness

[39] The application judge, Walters J., stated that she was "not satisfied that the applicant has set out the necessary evidentiary foundation for me to determine whether the expression in question is one which is protected by the Charter". She continued:

> Without any evidence directed to the nature of the expression that is being conveyed via billboards, the extent to which billboards are necessary to promote this expression, the hardship, effect, or impact of the by-law on the applicant or other interested parties, the court is not in a position to make the finding requested by the applicant. Certainly the applicant has provided evidence of the effectiveness of billboards, the use of billboards in various other municipalities and the number of billboards per capita in other municipalities. However, none of this information deals with the adverse impact this by-law has on any freedom of expression.

[40] Borins J.A. disagrees with Walters J.'s analysis and conclusion on the ripeness issue. He states:

> The application judge held that she lacked a factual basis to determine whether the advertising is protected under s. 2(b). However, the application judge acknowledged that she *knew* that "the content of the proposed billboard would contain commercial messages." I take this statement to mean that the application judge accepted as a fact that the content of the billboards' messages would be commercial in nature. I note that in addition to the commercial expression of prospective customers, Vann asked the court to take judicial notice of the

> fact that, as owner of the signs for rent, it can advertise its own business on the billboards.
>
> The application judge's factual finding is sufficient to determine whether the form and content of the proposed expression garners the protection of s. 2(b). Clearly, the intended expression is commercial expression, or advertising.

[41] I agree with Borins J.A.'s conclusion on this issue. In my view, the appellant placed a sufficient evidentiary record before the application judge to establish that its expression and the expression of prospective customers was affected by the Town of Oakville's sign by-law. However, the application judge's description of the factual record is not irrelevant; indeed, in my view, it becomes important when the analysis turns to the application of s. 1 of the *Charter* to the billboard component of the by-law.

(2) <u>Freedom of expression</u>

[42] I agree with Borins J.A. that the Oakville by-law infringes s. 2(b) of the *Charter*.

(3) <u>Section 1</u>

[43] I begin my analysis with a preliminary, but crucial, point. For the purpose of his *Charter* s. 1 analysis, my colleague joins ss. 2(5)(a) and 2(16) of the sign by-law. He says that they are "complementary" and that their combined effect is to ban all billboard and third party advertising on lands in Oakville.

[44] With respect, I do not agree with this characterization of the by-law. The billboard and third party sign provisions of the by-law are not complementary; rather, they are separate provisions completely unrelated to each other. In my view, a close examination of the definition and prohibition provisions of the by-law supports this conclusion.

[45] The definitions of "billboard" and "third party sign" are:

> **1.(9)** Billboard sign - Any ground sign other than a temporary Real Estate sign . . . measuring more than 7.5 square metres (80 square feet) in sign area;
>
> **1.(42)** Third party sign – Any sign which directs attention to products, goods, services, activities or facilities which are not the principal

> products, goods, services, activities or facilities provided on the premises upon which the sign is located;

[46] The prohibition provisions of the by-law relating to billboards and signs are:

> **2.(5)(a)** No person shall locate or permit the location of a billboard sign.
>
> **2.(16)** No person shall locate or permit the location of a third party sign.

[47] I conclude from the structure and wording of these provisions that there is no linkage between the definitions and prohibitions relating to billboards and third party signs. The provisions respecting billboards deal only with size; there is nothing about the message or contents of signs in these provisions. Conversely, the provisions relating to third party signs deal only with message or contents; there is nothing about the form of expression, including the size of signs, in these provisions.

[48] It is true, as my colleague points out, that Mr. Vann challenges both provisions of the by-law. That is because he wants to sell advertising space to his customers (hence the attack on the third party sign provisions of the by-law) and he wants to do so on very large signs (hence the attack on the billboard provisions of the by-law). However, a two-pronged attack by the appellant does not convert two separate provisions into a "complementary" legislative regime. At the end of the day, ss. 2(5)(a) and 2(16) of the by-law deal with entirely different subject matters: s. 2(5)(a) relates *only* to form; s. 2(16) relates *only* to content. Accordingly, it is essential to conduct a separate s. 1 analysis for each provision.

(a) The billboard provision

[49] I agree with my colleague's analytical framework for assessing whether this component of the by-law violates s. 1 of the *Charter*:

> The onus now shifts to Oakville to demonstrate that its sign by-law is a reasonable limit that can be demonstrably justified. The test set out by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103 requires Oakville to show, first, that its objective in passing the sign by-law is pressing and substantial; second, that the by-law is rationally connected to that objective; third, that the by-law minimally

> impairs the right to freedom of expression; and finally, that there is proportionality between the effects and the objectives of the by-law.

(i) Pressing and substantial objective

[50] Borins J.A. describes the multi-faceted objectives of the by-law as "to protect the public from unsafe signs, to reduce distractions that may be an impediment to road safety, to prevent the blight of unsightly signs, and to preserve the unique character of Oakville". He concludes that these objectives are pressing and substantial. I agree.

(ii) Rational connection

[51] Borins J.A. states: "In my view, Oakville has failed to demonstrate that the sign by-law is rationally connected to achieving its stated goals". In the next paragraph he says: "Oakville has failed to demonstrate that the blanket prohibition on billboard signs is rationally connected to preserving the unique small town feel of the city". Two paragraphs later, he states: "Nonetheless, I am willing to accept that fewer visual distractions do promote road safety such that the prohibition on billboards is rationally connected to that goal".

[52] There are three problems with this analysis. First, with respect, the analysis is inconsistent. If the prohibition on billboards is rationally connected to one of the goals of the by-law (road safety), I fail to see how my colleague can conclude that "Oakville has failed to demonstrate that the sign by-law is rationally connected to achieving its stated goals".

[53] Second, in my view a complete prohibition on certain types of signs is entirely rationally connected to three of the four components my colleague sets out in his description of the purpose of the by-law. No signs larger than 7.5 square metres certainly promotes the goal of an absence of unsafe signs. No signs larger than 7.5 square metres will reduce distractions to motorists. And no signs larger than 7.5 square metres will reduce the blight of unsightly signs.

[54] Third, my colleague's conclusion on the rational connection component of the s. 1 analysis is inconsistent with the conclusion on this issue reached by this court in all of the leading sign by-law cases: see *Nichol (Township) v. McCarthy Signs Co.* (1997), 33 O.R. (3d) 771 at 774 (*"Nichol (Township)"*); *Stoney Creek (City) v. Ad Vantage Signs Ltd.* (1997), 34 O.R. (3d) 65 at 71 (*"Stoney Creek"*); *Canadian Mobile Sign Assn. v. Burlington (City)* (1997), 34 O.R. (3d) 134 at 138, leave to appeal to the Supreme Court of Canada refused, March 19, 1998; and *Urban Outdoor Trans Ad v. Scarborough (City)*

(2001), 196 D.L.R. (4th) 304 at 318. As expressed by Charron J.A. in *Stoney Creek*, at p. 71:

> In my view, all provisions in the by-law concerning mobile and portable signs are rationally connected to the purpose of the by-law. Even a total prohibition would still be rationally connected to the stated objective. Obviously, if all portable and mobile signs were removed in the City of Stoney Creek the concerns sought to be addressed by the by-law would be fully answered.

(*iii*) *Minimal impairment*

[55] My colleague concludes that s. 2(5)(a) of the by-law violates the minimal impairment component of the *Oakes* analysis. Central to this conclusion is his assertion that the by-law "creates an absolute prohibition on billboards within Oakville".

[56] With respect, this description of the effect of the by-law is inaccurate. The Oakville by-law is not an absolute prohibition against all signs or billboards, as was the by-law ("sign . . . any advertising billboard") struck down recently by the Supreme Court of Canada in *R. v. Guignard* (2002), 209 D.L.R. (4th) 549 ("*Guignard*"). Rather, the Oakville by-law prohibits certain types of billboards, namely, those larger than 7.5 square metres (80 square feet) in sign area. Billboards smaller than these measurements are *not* prohibited.

[57] In several cases, the Supreme Court of Canada and this court have explicitly stated that municipal regulation of the display of signs and posters including, importantly, provisions relating to their size, is permitted and is consistent with the minimal impairment component of the *Oakes* analysis: see *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 at 1107; *Toronto (City) v. Quickfall* (1994), 16 O.R. (3d) 664 at 671 (C.A.); and *Stoney Creek, supra*, at p. 72. In my view, the billboard component of the Oakville by-law is consistent with these authorities.

[58] Moreover, once it is accepted that size restrictions on billboards are appropriate, it strikes me that the courts should be deferential about the actual line chosen by a municipality. Absent evidence of an improper purpose or of a thoroughly unreasonable or impractical line, courts should respect the municipality's choice.

[59] In the present case, the rationale for the billboard component of the by-law was explained in an affidavit by John Ghent, the Manager of Current Planning for the Town of Oakville:

<u>Billboard Signs</u> . . .

> **38.** **. . .**[T]he by-law is similarly aimed at regulating only those signs which would pose the greatest concern relative to the objectives of the by-law. Primarily, this has been accomplished by incorporating size and height restrictions, so that if a sign complies with those restrictions it is permitted as of right **. . .** In the case of a "billboard sign", which is prohibited under section 2(5) of the by-law, there is an area restriction of 80 square feet, built right in to the definition in section 1(9) so that if the sign is smaller in area the by-law does not apply to it.

[60] On the appellant's side, in his affidavit filed in support of the application, Larry Vann, the President of the appellant, said nothing about the size component of the Oakville by-law. Nor is there any evidence from any of his prospective customers about how the size component of the by-law would affect their advertising activities. In short, there is nothing from the appellant to counteract Oakville's explanation for the line it chose to draw.

[61] I can state my conclusion on the minimal impairment issue in succinct fashion. The case authorities clearly establish that municipal regulation of the display of signs, including size restrictions, usually does not offend the minimal impairment component of the *Oakes* test. In my view, in the present case the record put forward by the Town of Oakville and the absence of any conflicting evidence tendered by the appellant lead to the conclusion that the respondent has met its onus to establish that the size component of its by-law minimally impairs the freedom of expression of the appellant.

(*iv*) *Proportionality*

[62] Since the objectives of the size component of the by-law are pressing and substantial, since there is a rational connection between the size restriction and the purposes of the by-law, and since the size restriction minimally impairs the freedom of expression of the appellant, it follows that there is the required proportionality between the effects and the objectives of the by-law.

(b) The third party sign provision

(i) Pressing and substantial objective

[63] Borins J.A. concludes that the objectives of the entire by-law, including the third party sign component, are pressing and substantial. I agree.

(ii) Rational connection

[64] For the reasons set out in my discussion of the billboard component of the by-law, I am of the view that there is a clear and direct rational connection between the prohibition against the third party signs and the pressing and substantial objectives of the by-law. The effect of the third party component of the by-law is fewer signs in Oakville. This effect is consistent with at least three of the four objectives my colleague sets out - to protect the public from unsafe signs, to reduce distractions that may be an impediment to road safety, and to prevent the blight of unsightly signs. As Charron J.A. said in rejecting the appellant's argument relating to the rational connection component of the s. 1 analysis in *Stoney Creek, supra*, "the appellant's argument is better addressed on the issue of minimal impairment" (p. 71).

(iii) Minimal impairment

[65] I agree with Borins J.A. that the third party sign component of the Oakville by-law does not minimally impair freedom of expression. However, I reach this conclusion on a different, and much narrower, basis than my colleague. In my view, the wording of the Oakville by-law is almost identical to the wording of the St. Hyacinthe by-law that was struck down recently by the Supreme Court of Canada in *Guignard, supra*. I set out the definitions of the prohibited types of signs in the two by-laws:

> ***St. Hyacinthe***
>
> Advertising sign:
>
> Sign indicating at least the name of a company and drawing attention to a business, a product, a service or an entertainment carried on, sold or offered other than the property on which it is placed.
>
> ***Oakville***

> Third party sign – Any sign which directs attention to products, goods, services, activities or facilities which are not the principal products, goods, services, activities or facilities provided on the premises upon which the sign is located;

[66] The Supreme Court of Canada struck down the St. Hyacinthe by-law because it infringed on *a property owner's right* to erect a sign criticizing an insurance company with which he was unhappy. That, of course, is not the basis for the challenge to the Oakville by-law. However, since the Supreme Court declared the St. Hyacinthe by-law to be invalid (rather than reading it down), it follows that the Oakville by-law, in its current form, is invalid.

[67] Lebel J. concluded his reasons in *Guignard* with this observation: "It will no doubt be in the respondent's interests to rethink the definition of "advertising sign", in particular, and more clearly identify the real objectives of the bans imposed" (p. 563). The Town of Oakville will need to engage in a similar exercise. For myself, I would simply say that once it overcomes the drafting problem of overbreadth identified in *Guignard* (which relates only to a restriction of the freedom of expression of a property owner), a by-law which restricts third party signs in all other respects should be constitutionally sound, provided there is a clear record demonstrating the pressing and substantial objectives of the by-law, such as community aesthetics and road safety.

(*iv*) *Proportionality*

[68] I agree with Borins J.A. that the third party sign component of the by-law does not survive the proportionality branch of the *Oakes* analysis.

<u>Disposition</u>

[69] I would declare that s. 2(5)(a) of the Town of Oakville sign by-law is valid.

[70] I would declare that s. 2(16) of the Town of Oakville sign by-law is invalid. I agree with Borins J.A. that it is appropriate to suspend the declaration for a period of six months.

[71] In my view, success on the appeal is not divided. The billboard component of the by-law is valid. The appellant has been successful in its attack on the third party component of the by-law. However, the challenge was successful only because the by-law was overbroad in that it infringed on the freedom of expression of property owners, *not* the expression of the appellant or its proposed customers. It will be relatively easy for Oakville to amend its by-law to deal with the *Guignard* problem while still

prohibiting all of the advertising the appellant seeks. Accordingly, I would award the respondent its costs of the appeal which I would fix at $8000.

RELEASED: June 14, 2002

"J. C. MacPherson J.A."